SIM KIM HUAT

v.

PHUA VEE LIN, JUSTINA

HIGH COURT, SINGAPORE
CHAO HICK TIN J
[ORIGINATING SUMMONS NO. 538 OF 1991]
1 NOVEMBER 1991

CONTRACT: *Sale and purchase of property - Draft option form - Agreement prepared by real estate agent - Whether constituted binding contract between parties - Meaning of "subject to contract" - Construction of documents - Statute of Frauds 1677, s. 4.*

The defendant and her husband jointly owned a property. They advertised in the newspaper for sale of the property. PCW, from Shelton Realty Services, property agents, negotiated on behalf of the plaintiff. The purchase price was agreed at $774,100. The plaintiff was not willing to sign the draft option agreement prepared by the defendant's solicitor without consulting his solicitor. Nor was the defendant willing to use the standard option form of the agents. Both parties envisaged that their solicitors should be able to finalize the terms of the option within two working days. In view of this, the plaintiff signed a standard form offer letter (the offer letter), prepared by PCW, which contained two conditions effecting the completion of the sale. The plaintiff made out a cheque for the deposit in the name of the defendant and her husband. PCW acknowledged receipt of the money.

PCW then prepared another form (the commission letter) which he filled in and which the defendant signed. The defendant alleges that she was told by PCW that the purpose of the commission letter was to evidence the fact that upon completion of the sale and purchase of the said property, his company will be entitled to charge a commission for the transaction.

The time of handing over of the cheque to the defendant is disputed, the defendant alleging that PCW handed the cheque over to her at his own initiative when he and the plaintiff were about to leave. On the other hand, PCW alleges that the defendant requested the cheque which was then handed over to the defendant with the concurrence of the plaintiff.

The next day, PCW called the defendant and asked for the return of the cheque saying that it was company policy that the company hold such cheques. The defendant returned the cheque and notified the plaintiff's solicitors.

There were further amendments to the draft option. By 25 May 1991 the solicitors finally resolved the terms of the draft option. Every communication from the defendant's solicitor to the plaintiff's solicitor was marked "subject to contract" and all communication between the parties' solicitors was by fax. On 29 May 1991 the defendant's solicitor wrote to say that the defendant was not proceeding with the sale.

The issue for the Court was whether there was a binding contract of sale and purchase in existence between the parties.

Held:

[1] On the evidence, it is clear that the parties agreed to defer the consideration and execution of the option agreement until the plaintiff's solicitors had perused and approved it.

[2] The insertion of "two working days' in condition 1 of the offer letter clearly suggests that as of that point in time, there was no binding contract. If it was intended that the commission letter would constitute the unqualified acceptance of the plaintiff's offer, the logical

thing to do would be to delete condition 1. Further, if at that time there already was a binding contract between the parties, the defendant should have been entitled to the option money. However, the evidence shows that the defendant was asked by PCW not to cash it until the option agreement was forthcoming.

[3] It was not necessary for the Court to make a definite finding as to the circumstances under which the cheque was handed over because in either situation, the defendant was not entitled to the cheque and was merely holding it. The fact that the next day, PCW rang the defendant up to request her to return the cheque, and the fact that she complied, reinforced the view that she was not entitled to the cheque.

[4] The commission letter could not constitute the acceptance within condition 1 of the offer letter because:

(a) it would render condition 1 completely redundant, bearing in mind that the commission letter was executed almost simultaneously with the offer letter and

(b) for there to be acceptance within the meaning of condition 1, the acceptance must be accompanied by the handing over of an executed option of the vendor.

[5] The offer letter and the commission letter should be read together. The two documents should also be considered in the light of the surrounding circumstances. When so viewed, the two documents clearly point to the fact that there is to be no binding contract until the option agreement is finalized and executed by the defendant and handed over to the agents.

[6] The two conditions in the offer letter make all the difference. Condition 1 in effect postpones the coming into existence of a binding contract until the option has been executed by the vendor; in substance, condition 1 amounts to saying "subject to option". Condition 2 is entirely consistent with this construction; there cannot be any doubt that the parties never intended to enter into an "open" contract on the basis that the three essential elements, parties, property and price, had been agreed.

[No binding contract in law; plaintiff's claim dismissed with costs.]

Cases referred to:
Von Hatzfeldt-Wildenburg v. Alexander [1911-13] All ER 148 ***(foll)***
Daimen Development Sdn Bhd v. Mathew Lui Chin Teck [1981] 1 MLJ 56 ***(foll)***
Gibson v. Holland [1865] L R IC P I ***(cit)***
Smith-Bird v. Blower [1939] 2 All ER 406 ***(cit)***

Legislation referred to:
Statute of Frauds 1677 [UK], s. 4

For the plaintiff - Maria Tham
For the defendant - Sarjit Singh Gill

JUDGMENT

Chao Hick Tin J:

This action raises the perennial problem of construction as to whether certain documents constituted a binding contract between the parties for the sale and purchase of property.

The defendant, together with her husband, one Lee Yew Seng Dennis, are the joint owners of the property situated at No. 43, Lorong Melayu, Singapore 1441 (Lot 1403 of Mk 23). Sometime at the end of April/early May 1991 they wanted to sell the property. An

advertisement was inserted in the newspaper. Among those who responded to the advertisement was a representative from Shelton Realty Services, who are property agents. The defendant furnished to that person the particulars relating to the property.

On or about 5 May 1991, one Phua Chia Whatt (PCW) from Shelton Realty Services contacted the defendant to say that he had a buyer for the property. PCW, on behalf of the plaintiff, negotiated with the defendant on the price. On 20 May 1991 an understanding was reached that the price would be fixed at $100 p.s.f. Sometime after 5.00 p.m. on 21 May 1991, the agent and the plaintiff came to the residence of the defendant to discuss the purchase of the property. They agreed that the sale price would be $774,100 (at $100 per square foot).

In the meantime, and before 21 May 1991, the defendant had instructed her solicitor to prepare a draft option agreement, which she had with her. The defendant was not willing to use the standard option form of the agents. She was ready to execute the option on the basis of her draft. However, the plaintiff was not prepared to accept the defendant's draft without first clearing it with his solicitor. In his affidavit he said that he wanted to "obtain (his) solicitors' explanation on the contents of the option and finalise the terms of the option with her through the solicitors". Accordingly, a copy of the draft option was left with the plaintiff. The defendant also left the name and address of her solicitor whom the plaintiff's solicitors should contact to settle the terms of the draft option. The parties envisaged that their solicitors should be able to finalize the terms of the option within two working days.

In view of this development PCW took out a form (hereinafter called the offer letter) and filled up the blank portions. The plaintiff was then asked to sign on it. As this is one of two crucial documents upon which this entire case turns, I will set it out in full:

Date: **21 May 1991**

Real Property known as : **No 43 Lorong Melayu (S'PORE 1441)**

Approximate

Land/Built-in area : **7,741 (SQ Feet/Metres)**

Tenure of Land : **Freehold Furnishings:**

Vendor's Name/s : **Mr Lee Yew Seng**
Dennis 1484888/F Ms. Phua Vee
Lin Justina 1634055/C

I/We the undersigned hereby agree to purchase the abovementioned Real Property through **Shelton Realty Services** as broker at the offer price of Singapore Dollars:

Seven Hundred and Seventy Four Thousand and One Hundred Only (S$774,100)

Enclosed herewith a Bank: **Posb** Cheque No._**062312** for the amount of **S$ 7,741** being option money for the purchase of the above **Real Property** subject to the following terms and conditions:

1. Within **Two** (2) working days, the vendor of the above **Real Property** must either accept or reject this offer. If accepted, please forward to me/us a copy of the Option to Purchase forms duly signed and witnessed or if rejected, the option money tendered herewith will be refunded to me/us without any interest thereon and thereafter neither party shall have any claims against the other.

2. Should I/we decide to withdraw after the vendor has accepted my/our offer and return the option to purchase forms duly signed and witnessed, the option money tendered herewith will be forfeited towards the vendor and thereafter I/we shall have no further claims whatsoever to it.

a **Mr Sim Kim Huat [Sgd]**

Name of Purcher/ Signature Company and/or Co's Stamp (Where Applicable)

b **1307573/E**
NRIC/Passport No:

Acknowledgment

I, **Mr Phua Chia Whatt** Membership Card No: **064** being a Sales Associate of **Shelton Realty Services Hereby** acknowledge receipt of the Option money tendered herewith.

c **[sgd] 1396204/I**
Signature & Nric No

* Option Money cheque to be made payable to Vendor's name.

* To be filled in duplicate.

(words filled in are in bold)

d It seems to me clear that the expression "option to purchase Form" referred to in condition 1 would ordinarily mean the standard option form of Shelton Realty Services. PCW explained that in our present case since the parties did not wish to use the standard form, the expression would mean the draft option which was to be discussed and finalized between the solicitors of the plaintiff and the defendant.

e The cheque was made out in the name of the defendant and her husband, they being the joint owners. This was in compliance with the express stipulation laid down in the form of the offer letter.

After the plaintiff had signed the offer letter and issued the cheque, PCW took out another form (hereinafter called the "commission letter") and filled the blanks. The defendant was *f* then asked to sign on it. As this document is the other crucial document I will similarly set it out in full:

Date: **21 May 1991**

The Manager
Shelton Realty Services
261 Waterloo Street
g #03-34 Waterloo Centre
Singapore 0718

Dear Sir

RE: **4 No 43 Lorong Melayu S(1441) Lot 1403 Mukim 23**

I/We confirm the sale of my/our property to the purchaser **Mr. Sim Kim Huat (1307573/E)**
h at an agreed price of Singapore Dollars **Seven Hundred and Seventy Four Thousand and**

One Hundred (S$774,100) only.

I/We have also agreed with your **Mr Phua Chia Whatt** that I/We will pay your company a commission of S$**7,741** and my/our solicitors will accept this as my/our irrevocable authority to pay the same direct to **Shelton Realty Services** on completion of the above sale.

i *[sgd]*

Signature of ...

Vendor Signature of Co-vendor

Name: **Ms Phua Vee Lin Justina** Name:

NRIC No: **1634055/C** NRIC No:

[sgd]
Signature of Witness

Name: **Mr. Phua Chia Whatt**

NRIC No: **1396204/I**

(words filled in are in bold)

According to the defendant, before she signed the commission letter she was told by PCW that the purpose of that letter was "to evidence the fact that upon completion of the sale and purchase of the said property his company will be entitled to charge a commission for the transaction." This aspect of the defendant's evidence is not really disputed. Further, it is also not controverted that the defendant was not pleased with the last paragraph of the commission letter. PCW agreed to its deletion after checking with his office over the telephone.

There is a conflict in evidence as to the point in time and the reason why the cheque was handed over to the defendant. The plaintiff said that the defendant asked for a deposit in the sum of $7,741. PCW also said that the defendant requested for the cheque. Because of that he asked the defendant to sign the commission letter. PCW said the cheque was handed over to the defendant with the concurrence of the plaintiff. On the other hand, the defendant said that PCW had on his own initiative handed over the cheque to her when PCW and the plaintiff were about to leave. However, both PCW and the defendant, in their evidence before me, have said that when the cheque was handed over to the defendant, the latter was expressly told not to cash it until the option had been finalized and executed. She agreed to that.

On the evening of 22 May 1991 PCW telephoned the defendant and asked for the return of the cheque. PCW explained that "it was his company's policy to hold such cheques." The defendant agreed.

The next morning the cheque was collected by PCW. The fact that the cheque was returned to the property agents was notified by the defendant's solicitors to the plaintiff's solicitors.

Also on 22 May 1991, the solicitors for the plaintiff communicated with the solicitors for the defendant and suggested certain amendments to p. 1 and clases 3,4,8,9 and 10 of the defendant's draft option. On the same day the defendant's solicitors replied stating, *inter alia*, that they were seeking client's instructions on the amendments.

On 23 May 1991 the defendant's solicitors further replied agreeing to some amendments and not agreeing to others. There were also further communications between the solicitors on 23, 24 and 25 May 1991. By 25 May 1991 the solicitors finally resolved the terms of the draft option.

Every communication from the defendant's solicitors to the plaintiff's solicitors was marked "**subject to contract**" on the top right hand corner. Then on 29 May 1991 the defendant's solicitor wrote to say that the defendant was not proceeding with the sale. All communications between the solicitors were by fax.

Both PCW (who deposed on behalf of the plaintiff) and the defendant were cross-examined on their affidavits. PCW's answers seem to sway according to which Counsel was asking him the questions. Of course there are some slight inconsistencies in the defendant's evidence as well. It seems to me that at the end of the day it is not so much what they now think that is important but what is stated in the two documents in the light of the surrounding circumstances.

The Law

For the plaintiff to succeed he must show that on 21 May 1991 there was concluded a binding contract of sale and purchase and such a contract is evidenced in a memorandum or memoranda sufficient to satisfy s. 4 of the Statute of Frauds 1677.

There are numerous authorities dealing with similar problems. It would appear that much would depend on the circumstances of the case and the words used in the relevant documents. I do not think any useful purpose would be served in re-citing those cases which Counsel have cited to me. Suffice it for me to quote two passages from two judgments where the applicable principles are succinctly set out. First is the judgment of Parker J in *Von Hatzfeldt-Wildenburg v. Alexander* [1911-3] All ER 148 where he said:

> It is a question of construction whether the execution of further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through.

Second is the judgment of the Privy Council in *Daimen Dvpt. Sdn Bhd v. Matthew Lui Chin Teck* [1981] 1 MLJ 56 at 58 where their Lordships said:

> The question whether parties have entered into contractual relationships with each other essentially depends upon the proper understanding of the expressions they have employed in communicating with each other considered against the background of the circumstances in which they have been negotiating, including in those circumstances the provisions of any applicable law. Where they have expressed themselves in writing the proper construction of the writing against that background will answer the question. The purpose of the construction is to determine whether the parties intend presently to be bound to each other or whether, no matter how complete their arrangements might appear to be, they do not so intend until the occurrence of some further event, including the signature of some further document or the making of some further arrangement. The question is one as to expressed intention and is not to be answered by the presence or absence of any particular form of words. But, in general, employment of the formula "subject to contract" as a condition of their arrangement will preclude the present assumption by the parties of contractual obligations.

Evaluation and findings

On the facts as set out above, it is clear that on 21 May 1991, when the plaintiff and PCW saw the defendant at the latter's home, an oral agreement was reached that the defendant would sell the property to the plaintiff at a price of $774,100. It is also clear that if on that day the plaintiff had accepted the defendant's draft option which the defendant had in hand, the defendant would have signed the option in favour of the plaintiff and that would have been a binding contract. In that event the plaintiff would not have been required by PCW to sign the offer letter and all that would have been required was for the defendant to sign the commission letter. I may add that if the parties had agreed to use the agents' standard option form the defendant need not even have to sign the commission letter as the standard option form provides for the commission of the agents.

As it turned out the plaintiff was not prepared to accept the draft option agreement which the defendant had in hand without his solicitors first looking through it. On the evidence, it is not in dispute and I do so find that the parties agreed to defer the consideration and execution of the option agreement until the plaintiff's solicitors had perused and approved it. It was also agreed that the solicitors of the two parties would liaise with each other to finalize the draft option agreement.

The question before me really boils down to determining what is the effect of the two documents which the plaintiff and the defendant had separately executed in favour of the agents. Counsel for the defendant rightly conceded that it does not really matter that in this instance the two documents were not addressed to other party but to a third person (see *Gibson v. Holland* [1865] L R IC P I and *Smith-Bird v. Blower* [1939] 2 All ER 406) - he question remains the same, whether each document singly, or both collectively, created a binding contract. Accordingly, the two documents have to be carefully scrutinized.

In the offer letter, the plaintiff, after stating that he agrees to buy the property from the vendor at the stated price, goes on to say that a cheque for $7,741 is enclosed "being option money for the purchase," subject to the two conditions stated therein. Condition 1 is especially significant. It says that within two working days the vendors must either accept or reject the offer. I find that the figure two was inserted because the parties thought that their solicitors would be able to finalize the draft within two days. That condition clearly suggests that as of that point in time, there was no binding contract. Plaintiff's Counsel contended to the contrary. I asked her where is the acceptance of the vendor within the meaning of that condition. She said the commission letter was the acceptance. With respect, I think she has not given sufficient consideration to the latter part of condition 1 which says:

> If accepted, please forward to me/us a copy of the option to purchase forms duly signed and witnessed ...

Even PCW, in answer to a question put by the defendant Counsel, said that for the defendant to accept this offer she had to forward a signed option.

It is not disputed that the commission letter was signed by the defendant immediately after the offer letter was signed by the plaintiff. If it was intended that the commission letter would constitute the unqualified acceptance of the plaintiff's offer the logical thing to do would be to delete condition 1 because that condition would no longer be applicable. The evidence shows that condition 1 was not deleted because the parties contemplated that they needed two days to finalize the draft option. Further, if at that time there was already a binding contract between the parties, it must follow that the defendant should be entitled to the option money. Yet the incontrovertible evidence is that when PCW handed over the cheque to the defendant, he asked the defendant not to cash it until the option agreement was forthcoming. Surely that militates against the suggestion that the parties did intend to create a binding contract at that stage.

As I have indicated above, there appears to be a conflict in evidence here as to whether PCW handed the cheque over pursuant to the request of the defendant or, as the defendant alleged, PCW on his own initiative handed over the cheque to her and she accepted it with a promise to PCW that she would not cash it before the execution of the option. I do not think it is necessary for me to make a definite finding on this factual point because in either situation the defendant was not entitled to the cheque as yet. She was merely holding it. If she was entitled, there would be no justification for asking her not to cash it.

In my opinion the fact that the next day PCW rang up the defendant to ask her to return the cheque and she complied therewith reinforced that view, that is, that she was not entitled to the cheque. It was given (or asked for) perhaps for comfort, or for some other reasons. I don't think it matters. In asking for the return of the cheque, PCW explained that it was in accordance with his company's policy that such a cheque should be held by the company. In my view, all these make sense. Under condition 1 the option money was only to be given to the vendor upon the vendor executing and handing over the signed option. By handing over the cheque without ensuring that condition was fulfilled, (even though the plaintiff did not object) there could be a question of responsibility if later there should be any difficulty in obtaining the return of the cheque. As PCW said on being further cross-examined, he felt responsible for the cheque; thus he asked for it to be returned.

There is one point which I ought to make plain. Even assuming that the defendant did request for the cheque, I find that she was asked to sign the commission letter not because of the fact that the cheque was handed to her but because that was the normal practice of the agents. PCW admitted on further cross-examination that even if the cheque were not handed over to the defendant he would have required her to sign the commission letter. I find that the purpose of making the defendant sign the commission letter was to have it in writing that the defendant had agreed to pay the agents the commission in the event that the deal should go through, and nothing more.

To summarize, in my judgment, the commission letter could not constitute the acceptance within condition 1 of the offer letter for these reasons:

(i) It would render condition 1 completely redundant, bearing in mind that the commission letter was executed almost simultaneously with the offer letter.

(ii) For there to be an acceptance within the meaning of condition 1, the acceptance must be accompanied by the handing over of an executed option of the vendor.

The problem could be looked at from another direction by asking the question: is the plaintiff entitled to withdraw the offer and ask for the return of the cheque at any time before the defendant has handed a signed option over to the agents. In the light of condition 2 the answer must be in the affirmative. I agree that in the lay sense, we could say that at that point in time an agreement was reached between the parties and the opening words in the commission letter reflect that. But the commission letter cannot be viewed in isolation. I fully concur with Counsel for the plaintiff that the offer letter and the commission letter should be read together. I would go one step further and say that the two documents should also be considered in the light of the surrounding circumstances. When so viewed, it is my opinion that the two documents clearly point to the fact that there is to be no binding contract until the option agreement is finalized and executed by the defendant and handed over to the agents.

The evidence of PCW as to the meaning and effect of condition 1 is most unsatisfactory. Let me illustrate. At cross-examination he said that the plaintiff was not obliged to go through with the deal if his solicitors were not satisfied with the draft option agreement; the parties were still free to choose. He also said that under condition 1 the defendant must forward the signed option. However, in re-examination he said though the option was not given there was a contract because the cheque was handed over to the defendant and if the plaintiff should decide not to go through with the deal the defendant could forfeit the cheque. (It may be noted that PCW changed again on further cross-examination). He seemed to place tremendous significance on the fact that the cheque was handed over to the defendant. But

as I have pointed out, if that was so why did he ask the defendant not to cash it? Why did he ask for its return the next day? Why did he feel "responsible" for the cheque when there was already in existence a contract? In the circumstances of the case and bearing in mind the two conditions I do not think the fact that the cheque was handed over to the defendant is really that material.

Accordingly, I am unable to accept the evidence of PCW and the submission of the plaintiff's Counsel that the plaintiff would not be able to ask for the return of the cheque even before the option agreement was executed by the defendant. Such an assertion is untenable and flies in the face of condition 2.

In my judgment, the two conditions in the offer letter make all the difference. Condition 1 in effect postpones the coming into existence of a binding contract until the option has been executed by the vendor. The terms of the option are still to be worked out. In substance condition 1 amounts to saying "subject to option". Condition 2 is entirely consistent with that construction. In the light of the undisputed facts, there cannot be any doubt that the parties never intended to enter into an "open" contract on the basis that the three essential elements, parties, property and price, had been agreed. They want **to** agree on all the other terms as well.

Finally, insofar as the subsequent correspondence between the parties' solicitors is concerned, I do not think it advances the cause of the plaintiff. It shows that the parties' solicitors were negotiating on some of the terms in the option agreement. Complete agreement on the terms of the draft option was only reached on 25 May 1991. But every letter written by the defendant's solicitors were marked "subject to contract", though the same was not done by the plaintiff's solicitors. Suddenly and unfortunately on 29 May 1991, the defendant changed her mind and did not wish to proceed with the transaction. Be that as it may, howsoever one may look at the correspondence between the solicitors there cannot be any doubt that no contract was brought into being by the correspondence if none existed before. I should hasten to add that the plaintiff is not relying on the correspondence to establish his case.

I regret very much the conclusion which I have reached in this case. In terms of business ethics such behaviour on the part of the defendant is not something the Court would encourage; it shows lack of good faith. Of course I appreciate that it is a course which either party could take. I was given to understand that the defendant backed out because she found a buyer who was prepared to pay her more for the property. Such behaviour has been derogatorily labelled as "gazumping": see *Tevanan v. Norman Brett (Builders) Ltd.* [1972] 223 Estates Gazette 1945. But I am afraid that as in law there is as yet no binding contract, there is no sanction against such behaviour. Accordingly, I dismiss the plaintiff's claim with costs.

Also found at [1992] 1 CLJ 323